

**TO BE FILED UNDER SEAL PURSUANT TO ORDER OF  
COURT DATED APRIL 14, 2008**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN DOE I, a minor, et al.,

Plaintiffs

vs.

THE SCHOOL DISTRICT OF THE CITY OF  
ALLENTOWN, et. al.,

Defendants.

Civil No.: 2:06-CV-1926 (PSD)

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

THE SCHOOL DISTRICT OF THE CITY OF  
ALLENTOWN,

Defendant.

Civil Action

Jury Trial Demanded

**PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION FOR  
SUMMARY JUDGMENT OF DEFENDANTS, ALLENTOWN  
SCHOOL DISTRICT, DR. EVA HADDON, BRADLEY CARTER,  
AND KIM CECCATTI**

**TABLE OF CONTENTS**

JOHN DOE I, et. al. v. ASD, et. al.

Civil No. 06-1926

TABLE OF AUTHORITIES.....

PARTIES INVOLVED.....

STATEMENT OF RELEVANT FACTS.....

SUMMARY OF ARGUMENT.....

QUESTIONS PRESENTED.....

**ARGUMENT**

A. Summary Judgment Standard

B. Evidence Exists to Establish the Necessary Elements of a Title IX Claim: Specifically  
The School District Had Actual Knowledge of

the Allentown School  
District Was Deliberately Indifferent in That Its Response to l Actions Were  
Clearly Unreasonable, and Plaintiffs All Suffered a Deprivation of  
Educational Benefit .....

C. Plaintiffs Have Established a Claim Under 42 U.S.C. §1983 Because the Harm  
Ultimately Caused Was Foreseeable, the Allentown School District Acted in  
Willful Disregard For the Safety of the Minor Plaintiffs, a Supervisory Custodial  
Relationship Existed Between the Students and the School District, and the Actors  
Used Their Authority to Create an Opportunity That Otherwise Would Not Have  
Existed For l to Occur.....

1. Individual Defendants are Not Entitled to Summary Judgment  
on the Basis of Qualified Immunity.....

CONCLUSION.....

## TABLE OF AUTHORITIES

### CASES

1. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247 91 L.Ed. 2d 202, 106 S. Ct. 2505 (1986).
2. *Ariel B. ex rel. Deborah B. v. Fort Bend Independent School District*, 428 Supp. 2d 640, 210 Ed. Law Rep. 145 (S.D. Tex. 2006).
3. *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir. 1986).
4. *Bonenberger v. Plymouth Tp.*, 132 F.3d 20, 27 (3d Cir. 1997).
5. *Bostic v. Smyrna School District*, 418 F.3d 355 (3d Cir. 2005).
6. *Brooks v. City of Philadelphia* 717 F. Supp. 2d 477 (E.D. Pa. 2010).
7. *Brown v. School District*, 2011 U.S. App. LEXIS 19349 (3d Cir. Pa. Sept. 20, 2011).
8. *City of Canton v. Harris*, 109 S. Ct. 1197 (U.S. 1989).
9. *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999).
10. *Dawn L. v. Great Johnstown School District*, 586 F. Supp. 2d 332 (2008).
11. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).
12. *Distasio v. Perkin Elmer Corp.*, 157 F. 3d 55, 64 (2d Cir. 1998).
13. *Doe. v. University of Illinois*, 138 F. 3d 653, 661 (7th Cir. Ill.1998).
14. *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d Cir. 1992).
15. *E.N. v. Susquehanna Township School District*, 2011 U.S. Dist. LEXIS 91316 \*18(M.D. Pa.2011)
16. *Estate of Smith v. Marasco*, 318 F. 3d 497 (3d Cir. Pa. 2003).
17. *Gabrielle M. v. Park Forest-Chicago Heights, IL. School Dist.*, 163, 315 F. 3d 817 (7th Cir. 2003).
18. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277, 125 Ed. Law Rep. 1055, 158 A.L.R. Fed. 751(1998).
19. *Irene B. v. Philadelphia Acad. Charter Sch.*, 2003 U.S. Dist. LEXIS 3020 (E.D. Pa. Jan. 29, 2003).
20. *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005).
21. *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531 (3d Cir. 1990).
22. *Kinman v. Omaha Public School District*, 171 F. 3d 607, 133 Ed. Law Rep. 418 (8th Cir. 1999).
23. *Kneipp by Cusack v. Tedder*, 95 F.3d 1199 (3d Cir. Pa. 1996)
24. *Massey v. Akron City Bd. of Educ.*, 82 F. Supp. 2d 735, 141 Ed. Law Rep. 1104 (N.D. Ohio 2000)
25. *Maxwell v. School Dist. of Philadelphia*, 53 F. Supp. 2d 787 (E.D. Pa. 1999).
26. *Murrell v. School District No. 1, Denver, Colo.*, 186 F.3d 1238, 137 Ed. Law Rep. 678 (11th Cir. 2003).

27. *M.W. v. Panama Buena Vista Union School District*, 110 Cal. App. 4<sup>th</sup> 508, 1 Cal. Rptr. 3d 673, 178 Ed. Law Rep. 404 (5<sup>th</sup> Dist. 2003).
28. *Nicini v. Mora*, 212 F. 3d 798, 806 (3d Cir. 2000).
29. *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 725(3d Cir. Pa. 1989
30. *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010).
31. *Walter v. Pike County, Pa.*, 544 F.3d 182 (3d Cir. 2008).
32. *Williams ex rel. Hart v. Paint Valley Local School District*, 400 F.3d 360, 196 Ed. Law Rep. 27, 2005 FED App. 0118P (6th Cir. 2005).
33. *Williamson v. City of Houston, Tex.*, 148 F.3d 462, 466 (5<sup>th</sup> Cir. 1998)

#### **OTHER CITATIONS**

34. Fed. R. C.P. 56(c).
35. Title IX, 20 U.S.C. Section 1681 (a) (1994).
36. Title 24 § 13-1303A(c).
37. Education Amendments of 1972, §901 et seq.; 20 U.S.C.A. §1681 et seq.
38. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, United States Department of Education (2001).
39. *Protecting Students from Harassment and Hate Crime: A Guide for Schools* U.S. Department of Education Office for Civil Rights, National Association of Attorneys General, 27 (1999).

**TO BE FILED UNDER SEAL PURSUANT TO ORDER OF  
COURT DATED APRIL 14, 2008**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN DOE I, a minor, et al.,

Plaintiffs

vs.

THE SCHOOL DISTRICT OF THE CITY OF  
ALLENTOWN, et. al.,

Defendants.

Civil No.: 2:06-CV-1926 (PSD)

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

THE SCHOOL DISTRICT OF THE CITY OF  
ALLENTOWN,

Defendant.

Civil Action

Jury Trial Demanded

**PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT  
OF DEFENDANTS, ALLENTOWN SCHOOL DISTRICT, DR. EVA HADDON,  
BRADLEY CARTER, AND KIM CECCATTI**

Plaintiffs, John Does I-V, by and through their counsel, Pfeiffer, Bruno, Minotti & DeEsch, hereby oppose the motion for summary judgment filed by Defendants, Allentown School District, Eva Haddon, Bradley Carter, and Kim Ceccatti, and in support thereof submit the following memorandum of law:

**I. INDIVIDUALS INVOLVED**



## **APPLICABLE ALLENTOWN SCHOOL DISTRICT POLICIES**

### **1. Sexual Harassment Policy—**

The Allentown School District had a Sexual Harassment Policy in place during the 2003-2004 academic year that stated that “sexual harassment is a violation of district policy, as well as state and federal laws, and it is hereby prohibited” and that “any district student who engages in conduct which constitutes sexual harassment, defined in this policy, shall be subject to discipline which may include expulsion from school.” (Appx. Ex. 1, P-3).

The School District’s Policy then defines sexual harassment as:

1. Unwelcome sexual advances OR
2. Requests for sexual favors OR
3. Other unwelcome verbal or physical conduct or written communication of a sexual nature wherein:
  - a. Submission to such conduct is either explicitly or implicitly a term or condition of the student’s status in a class, course, program, or activity; OR
  - b. Submission to or rejection of such conduct is used as the basis for educational or other decisions affecting the student; OR
  - c. Such conduct has the purpose or effect of unreasonably interfering with the student’s educational experience or school performance; OR
  - d. Such conduct has the purpose or effect of creating an intimidating, hostile, or offensive learning environment.

Sexual harassment may include, but is not limited to unwelcome:

1. Verbal forms, as for example, sexual propositions or threats, sexually suggestive comments, sexual jokes, pressure to date, and obscene comments or noises.
2. Written forms, as for example, notes or letters of a sexually suggestive or obscene nature.
3. Physical forms, as for example, sexual assault, intentional touching, patting, pinching, hugging, kissing, brushing against a student’s body, and impeding a student’s movement.
4. Visual forms, as for example, staring or leering at a student’s body, sexually suggestive body movements, displaying sexually suggestive pictures, drawings, cartoons, or objects. (Appx. Ex. 1, P-3, p. 1-3).

The policy then states that a student who is being harassed, or that student’s parent, must report the incident to the principal or other appropriate school or district personnel including a teacher,

counselor, nurse, librarian, administrator, or the assistant superintendent. (Appx. Ex. 1, P-3, p.2). All complaints must then be referred to the Assistant Superintendent of Human Resources and Operations within ten days. (Appx. Ex.1, P-3, p.3). If the harassed student is not satisfied with an informal remedy, then the administration must have a formal investigation which must include an interview of the harassed student, the accused, and any other person having personal knowledge of the allegations of the complaint. (Appx. Ex. 1, P-3, p.3). Once that investigation is concluded, the results must be reported in writing to the Superintendent, the building principal, the staff member to whom the complaint was initially made, the complainant, and the accused. (Appx. Ex.1, P-3, p.3). If there is sufficient evidence that sexual harassment has occurred, the principal in consultation with the Assistant Superintendent of Human Resources and Operations must determine appropriate remediation and discipline for a student offender. (Appx. Ex. 1, P-3, p.3).

## **2. The Code of Conduct—**

The Code of Conduct categorizes student offenses into four levels of infractions. The Code then describes applicable responses for each level. Level III infractions include harassment and threatening other people. (Appx. Ex. 2, P-7, p.13). That section states that potential criminal violations will be reported to the police and that all police reports will be documented on the PDE 360 Incident Report, which is submitted to the District's central office. Criminal violations involving a student under ten-years-old are to be reported to the Lehigh County Office of Children and Youth. (Appx. Ex. 2, P-7, p. 13).

Level IV, the most serious level of infractions, includes sexual assault, student assault, threatening person, intimidation/ bullying, and indecent exposure among other listed offenses. (Appx. Ex. 2, P-7, p.13-14). Under Level IV Consequences, in addition to the same

consequences listed under Level III, the Code also states that for the safety of the school, an offending student will be immediately removed from his school assignment. (Appx. Ex. 2, P-7, p.14).

### **3. Memorandum of Understanding—**

In addition to the District's Code of Conduct, there is another source of authority that also mandates that crimes are to be reported to the police. Title 24 §13-1303 is a law regarding safe schools which requires every school district to have a memorandum of understanding with their local police. The Memorandum of Understanding is an agreement between the District and the Allentown Police Department that requires the District to report to the Police Department all student actions that violate criminal law. (Appx. Ex.3, P-45). It is an agreement that is required by state law. The agreement recognizes that educators are not experts in Pennsylvania criminal law or investigation, so the agreement further states that the District will defer to the police on criminal matters. (Appx. Ex. 3, P-45, Bates 1457-1458).

### **STATEMENT OF RELEVANT FACTS**

The record reflects that the ASD Defendants possessed substantial information and knowledge regarding

**Prior History**

Shortly thereafter, ASD administrators made a decision in June 2003 to transfer to Central Elementary and enroll him in a Learning Support Program provided in a general

classroom for the entire day, despite the objections of Dr. Grim. (Appx., Ex. 80 , D.T. Hartman 113-127; Ex. 7, D.T. Grim 86). As a result,        was placed into teacher Lori Freibolin's regular 5<sup>th</sup> grade class at Central Elementary with Amy Enright serving as        Learning Support teacher in the beginning of the 2003-2004 school year.



**Incident**



Mr. Carter's notes indicate that Ms. Haddon directed Mr. Carter to conduct an investigation to determine which students were out of their classrooms at the time of the incident and interview them in attempt to identify the perpetrator. (Appx., Ex. 16, P-27).

During his deposition, Mr. Carter testified that both he and Ms. Haddon were in responsible for student discipline at Central. (Appx., Ex. 12, D.T. Carter 35-37). However, Mr. Carter was woefully ignorant of ASD policies and procedures and did not even know what Title IX was. (Appx., Ex. 12, D.T. Carter 37, 57-58). In particular, Mr. Carter testified that he had not received any training regarding student discipline and did not consult with ASD policies and procedures for student discipline. (Appx., Ex. 12, D.T. Carter 57-58). Mr. Carter testified that he had not received any training for conducting investigations and did not follow any protocol or procedure for conducting investigations at the school. (Appx., Ex. 12, D.T. Carter 297). Mr. Carter testified that he could not recall any specifics regarding the incident involving or any investigation that was performed. (Appx., Ex. 12, D.T. Carter 293-294).

At the same time, Ms. Ceccatti's student note card for reflects that on September 23, 2003, mother came into school upset about the incident that occurred in the bathroom the day prior and that Ms. Haddon and Ms. Ceccatti interviewed (Appx., Ex. 70, Ceccatti 6). There was no further documentation regarding the content of the interview. At her deposition, Ms. Ceccatti did not recall any specifics regarding the incident involving or any

investigation that was performed. (Appx., Ex. 29, D.T. Ceccatti 157). However, Ms. Ceccatti's calendar noted a meeting with Mr. Carter on 9/23/03 regarding (Appx., Ex. 29, D.T. Ceccatti 157). Ms. Ceccatti's phone logs show that on September 24, 2003, Ms. Ceccatti made two telephone calls regarding , one call to Juanita Reyes, an ASD employee in the attendance office, and another call to father. Ms. Ceccatti had no recollection of these telephone conversations during her testimony. (Appx., Ex. 29, D.T. Ceccatti 202-205). Ms. Ceccatti also admitted during her testimony that she had received no training regarding sexual harassment, how to conduct investigations, or how to interview child victims of sexual abuse. (Appx., Ex. 29, D.T. Ceccatti 191).

The record is completely devoid of any evidence that Mr. Carter, Ms. Haddon, or any other ASD personnel followed through with or even documented an investigation regarding the incident involving as required by ASD policies and procedures. In addition, there is no evidence that any ASD personnel contacted OCYS or the Allentown Police Department regarding the incident involving as required by the Memorandum of Understanding.

However, Lori Friebolin, 5<sup>th</sup> grade teacher, testified that when she returned from maternity leave in the end of September 2003, she was advised that bathroom privileges were restricted.

Ms. Friebolin testified that bathroom restriction mean that he must be escorted to and from the bathroom and that he was not permitted to be in the bathroom with other children. (Appx., Ex. 17, D.T. Friebolin 97-101). However, Ms. Friebolin testified that that she still permitted to go to the bathroom with other children during class bathroom breaks unsupervised and unattended. (Appx., Ex. 17, D.T. Friebolin 167).

mother also testified that she was informed near the beginning of the 2003-2004 school

year that        would be escorted to and from the bathroom because l

r

At Principal Haddon's deposition, she testified that she did not recall any information regarding the bathroom incident involving (Appx., Ex. 11, D.T. Haddon 228-232). However, Ms. Haddon did confirm that        bathroom privileges were restricted in or around September 2003, but she claimed that it was due to merely wandering the halls. (Appx., Ex. 11, D.T. Haddon 122-123). It should be noted that there exists no evidence that any ASD personnel ever created, drafted, or maintained any written records whatsoever regarding        bathroom restriction and/or the reasons for same.

**Incident (John Doe I)**



Neither Mr. Carter, Ms. Haddon, nor any other ASD personnel spoke to or otherwise conducted any type of investigation regarding this incident as required by ASD policies and procedures. In addition, there is no evidence that any ASD personnel contacted OCYS or the

Allentown Police Department regarding the incident involving as required by the  
Memorandum of Understanding.

**Incident (John Doe III)**

The following day, [redacted] and his mother came back to the school and looked through the yearbook and picked out a photograph of an older boy

(Appx., Ex. 23, D.T. [redacted] 16-18). Mr. Carter did not tell [redacted] or his mother the name of the boy that [redacted] had picked out, but told [redacted] mother that he would take care of the matter and that [redacted] would be "out of school". (Appx., Ex. 23, D.T. [redacted] 18).

[redacted] mother testified that she took her son back to his class and [redacted] mother spoke to teacher, Ms. Csanadi, and told her what [redacted] had reported. (Appx., Ex. 23, D.T. [redacted] 18).

Ms. Csanadi stated that she recalled [redacted] mother coming into Central elementary very upset one morning during the 2003-2004 school year and that [redacted] Mother's began yelling

Ms. Csanadi stated that Mr. Carter approached the situation and escorted [redacted] and his mother to the main office. (App., Ex. 20, 3/13/06 p. 8). Ms. Csanadi stated that Mr. Carter brought [redacted] back to class later and said that no one would be calling the police because there was a discrepancy in [redacted] story and because the incident did not occur during normal school hours but rather under the supervision of afterschool daycare. (App., Ex. 20, 3/13/06 p. 8-10). Ms. Csanadi advised Mr. Carter that they were required to report the incident to the police for further

investigation. (App., Ex. 20, 3/13/06 p. 11). Ms. Csanadi stated that Mr. Carter instructed her not to get involved and to not contact the police. Mr. Carter advised Ms. Csanadi that "she had a class to teach", that the matter is "out of her control" and she should not worry about it, and that the police were not being called. (App., Ex. 20, 3/13/06 p. 13).

Mr. Carter's notes reflect that [redacted] and his mother were referred to him by Ms. Csanadi on January 22, 2004 regarding an incident that occurred in the bathroom. (Appx., Ex. 16, P-27). Mr. Carter's notes state that on the day prior, while [redacted] was in the cafeteria with daycare after school, that [redacted] went to the bathroom [redacted] (Appx., Ex. 16, P-27). During his deposition, Mr. Carter testified that [redacted] was under the supervision of Dee's Daycare at the time of the incident. Mr. Carter's testimony and notes indicate that [redacted] identified another student, [redacted] from the yearbook photos [redacted] (Appx., Ex. 16, P-27; Ex. 12, D.T. Carter 301). Mr. Carter's notes further indicate that he contacted [redacted] parents, interviewed [redacted] and his friends, and determined that [redacted] had an alibi on the date of the incident and that he had been misidentified. (Appx., Ex. 16, P-27; Ex. 12, D.T. Carter 307). Mr. Carter testified that he spoke to the other students and his notes reflect that [redacted] alibi checked out and [redacted] was not the student [redacted] (Appx., Ex. 12, D.T. Carter 307). Mr. Carter testified that he did not look for another perpetrator and abandoned the investigation at that point, but that he could have done more if [redacted] felt that it might have been another student. (Appx., Ex. 12, D.T. Carter 313).

However, Mr. Carter never advised [redacted] or his Mother regarding the outcome of his initial investigation. Mr. Carter also never advised [redacted] or his mother that not all student's photographs were in the yearbook that [redacted] initially reviewed. Mr. Carter never showed [redacted] any additional photographs or otherwise provided him with an opportunity to identify the true perpetrator.

There is no evidence that Mr. Carter or any other ASD personnel followed through with or even documented the investigation regarding the incident involving      as required by ASD policies and procedures. In addition, there is no evidence that Mr. Carter ever contacted OCYS or the Allentown Police Department regarding the incident involving      as required by the Memorandum of Understanding.

In addition, Ms. Ceccatti's student note card for      indicates that she spoke to      on January 26, 2004, as per Mr. Carter's request, regarding an incident in the bathroom      and her note states that she left a message for "mom". (Appx., Ex. 24, Ceccatti 5). OCYS records also indicate that Ms. Ceccatti left a voicemail message for OCYS caseworker, Ms. Wright, on January 27, 2004, and that Ms. Wright returned her call on January 29, 2004. (Appx., Ex. 26, P-121).

**Incident (John Doe II)**





grandmother testified that the school never informed her about what happened to him. reported to her on the day of the incident

She informed mother about what happened and told her to go to the school the next day when she picked up and find out what happened. grandmother also testified that mother went to Central Elementary the next day and asked about the incident, but that the principal told her that they had already taken care of it. (Appx., Ex. 29, D.T. 9-11). mother testified that she recalled speaking to someone at the school regarding the incident, but that they advised her that they were taking care of it, "nothing really happened" and that "got out safe." (Appx. Ex. 73, D.T. J.N. 15-16)

Ms.

Ceccatti advised Ms. Wright that the school was taking precautions in supervising to ensure that is not alone in the bathroom with other children. (Appx., Ex.31, P-122).

There is no evidence that Mr. Ceccatti, Mr. Carter, or any other ASD personnel followed through with or even documented the investigation regarding the incident involving as

required by ASD policies and procedures. In addition, there is no evidence that any ASD personnel ever contacted the Allentown Police Department regarding the incident involving as required by the Memorandum of Understanding.

**Incident (John Doe V)**



Ms. Ceccati also acknowledged that she did not keep any records regarding the content of her interview with       or any of her interviews with any of the other children involved in these bathroom incidents. (Appx., Ex. 29, D.T. Ceccati 176-180).

There is no evidence that Mr. Ceccatti, Mr. Carter, or any other ASD personnel followed through with or even documented the investigation regarding the incident involving as required by ASD policies and procedures. In addition, there is no evidence that any ASD personnel ever contacted the Allentown Police Department regarding the incident involving as required by the Memorandum of Understanding.

**Incident (John Doe IV)**



Police arrived at the school shortly thereafter and commenced an immediate investigation and interviewed [redacted] father, and several ASD personnel.

**Deprivation of Plaintiffs' Educational Opportunities or Benefits**

**(John Doe I)**



**(John Doe III)**



(John Doe II)



**(John Doe V)**

**(John Doe IV)**

### **Summary of Argument**

The Allentown School District violated Title IX. There are numerous facts throughout the record that show that several bathroom incidents occurred, the District had actual knowledge of the incidents, the District was deliberately indifferent in that their response was clearly unreasonable based upon a totality of the known circumstances, and the plaintiffs' suffered a deprivation to their educational benefits as a result.

The Allentown School District violated §1983 because District personnel committed numerous affirmative acts that constituted a state created danger. These arguments are further discussed below and demonstrate that the motion for summary judgment should be defeated.

As early as August 2003, the District knew

The elements are satisfied to maintain a Title IX suit. On the question of "notice"

The element of deliberate indifference is satisfied because the response of the District to each of these incidents was clearly unreasonable in light of the known circumstances. Finally, each Plaintiff had some cognizable injury diagnosed by the psychological experts in this case, which have been shown to be detrimental to Plaintiff's education.

The elements are also met to maintain an action under section 1983. Defendants

mischaracterize the evidence and certain affirmative acts were taken that caused the Plaintiffs to be in a worse condition resulting in injury. There were numerous affirmative acts including directing a teacher or parent not to call the police and

The facts of this record rise to a violation of both the 14<sup>th</sup> Amendment's Due Process clause and a violation of the funding recipient's obligations under Title IX.

## **II. QUESTIONS PRESENTED**

A. WHETHER DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT FOR THEIR ARGUMENT THAT PLAINTIFFS HAVE FAILED TO ESTABLISH A CLAIM UNDER IX?

Suggested Answer: No

B. WHETHER DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT FOR THEIR ARGUMENT THAT PLAINTIFFS HAVE FAILED TO ESTABLISH A CLAIM UNDER 42 U.S.C. §1983?

Suggested Answer: No

1. WHETHER INDIVIDUAL DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY

Suggested Answer: No

## **III. ARGUMENT**

### **A. Summary Judgment Standard**

The standard for summary judgment is well set. The court must determine whether there is no genuine issue of material fact that results in the moving party being entitled to judgment as

a matter of law. Fed. R. C.P. 56(c). All reasonable inferences from the record are drawn in favor of the non-movant.

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. C.P. 56(c); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247 91 L.Ed. 2d 202, 106 S. Ct. 2505 (1986); *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of the case are "material." *Anderson* at 248. All reasonable inferences from the record are drawn in favor of the non-movant. *Id.* at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531 (3d Cir. 1990).

**B. Evidence Exists to Establish the Necessary Elements of a Title IX Claim Specifically the School District had Actual Knowledge**

**the Allentown School District was Deliberately Indifferent in that its Response is Clearly Unreasonable Based Upon the Known Circumstances, and the Plaintiffs all Suffered a Deprivation of Educational Benefit**

Title IX, 20 U.S.C. Section 1681 (a) (1994), states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

In 1999 the Supreme Court ruled that a school district may be liable under Title IX for severe, pervasive, and objectively offensive peer sexual harassment that deprives a student victim of access to education. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 644-45

(1999). Damages liability is not imposed on a school district based on agency principles or a negligence standard. *Id.* at 642.

To prevail on a claim of student on student sexual harassment under Title IX, the plaintiff must show that:

- (1) the defendant received federal funds;
- (2) sexual harassment occurred;
- (3) the harassment took place under "circumstances wherein the defendant exercised substantial control over both the harasser and the context in which the harassment occurred";
- (4) the defendant had "actual knowledge" of the harassment;
- (5) the defendant was "deliberately indifferent" to the harassment; and
- (6) the harassment was "so severe, pervasive, and objectively offensive that it could be said to have deprived the victims of access to the educational opportunities or benefits provided by the school. *Davis*, at 650.

1) The Defendant is a Recipient of Federal Funds

This element seems to be uncontested. Russell Mayo, the acting superintendent, acknowledged in his deposition that the Allentown School District is in fact a recipient of federal funding. (Appx. Ex. 50, D.T. Mayo: 19).

2) Sexual Harassment Occurred

The Allentown School District had in place at all relevant times Sexual Harassment Policy No. 248 (hereinafter referred to as the Sexual Harassment Policy) originally adopted on 4/25/96 and revised as of 3/26/98. (Appx. Ex. 1, P-3).

Said policy was included in Allentown School District Official Code of Conduct in effect at all relevant times. (Appx. Ex. 2, P-7, p. 21-23).

The Sexual Harassment Policy defines sexual harassment as follows:

1. Unwelcome sexual advances OR
2. Requests for sexual favors OR

3. Other unwelcome verbal or physical conduct or written communication of a sexual nature wherein:

- a. Submission to such conduct is either explicitly or implicitly a term or condition of the student's status in a class, course, program, or activity; OR
- b. Submission to or rejection of such conduct is used as the basis for educational or other decisions affecting the student; OR
- c. Such conduct has the purpose or effect of unreasonably interfering with the student's educational experience or school performance; OR
- e. Such conduct has the purpose or effect of creating an intimidating, hostile, or offensive learning environment.

Sexual harassment may include, but is not limited to unwelcome:

- 1. Verbal forms, as for example, sexual propositions or threats, sexually suggestive comments, sexual jokes, pressure to date, and obscene comments or noises.
- 2. Written forms, as for example, notes or letters of a sexually suggestive or obscene nature.
- 3. Physical forms, as for example, sexual assault, intentional touching, patting, pinching, hugging, kissing, brushing against a student's body, and impeding a student's movement.
- 4. Visual forms, as for example, staring or leering at a student's body, sexually suggestive body movements, displaying sexually suggestive pictures, drawings, cartoons, or objects.

(Appx. Ex. 1, P-3, p. 1-3).

The policy then states that a student who is being harassed, or that student's parent, must report the incident to the principal or other appropriate school or district personnel including a teacher, counselor, nurse, librarian, administrator, or the assistant superintendent. (Appx. Ex. 1, P-3, p. 2). All complaints must then be referred to the Assistant Superintendent of Human Resources and Operations within ten days. (Appx. Ex. 1, P-3, p. 3). If the harassed student is not satisfied with an informal remedy, then the administration must have a formal investigation which must include an interview of the harassed student, the accused, and any other person having personal knowledge of the allegations of the complaint. (Appx. Ex. 1, P-3, p. 3). Once that investigation is concluded, the results must be reported in writing to the Superintendent, the building principal, the staff member to whom the complaint was initially made, the complainant,

and the accused. (Appx. Ex. 1, P-3, p. 3). If there is sufficient evidence that sexual harassment has occurred, the principal in consultation with the Assistant Superintendent of Human Resources and Operations must determine appropriate remediation and discipline for a student offender. (Appx. Ex. 1, P-3, p. 3).

The Sexual Harassment Policy also includes a section entitled, "Sexual Harassment of Elementary School Students." That section states that it is only a summary of the Sexual Harassment Policy, but it also states that sexual harassment may be reported to *any adult at the school*, that there are report forms available from *any adult at the school*, and that all reports will be taken seriously. (emphasis added)(Appx. Ex. 1, P-3, p. 3).

In summary, each Plaintiff was subjected to conduct which met the definition of sexual harassment pursuant to the District's Sexual Harassment Policy.

3) The Harassment Took Place Under "Circumstances Wherein the Defendant Exercised Substantial Control Over Both the Harasser and the Context in Which the Harassment Occurred"

The courts have recognized that when misconduct occurs during school hours and on school grounds the misconduct is taking place "under" and "operation" of the school funding recipient. Liability exists where a school fails to respond properly to the "student on student" sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees. *Doe. v. University of Illinois*, 138 F. 3d 653, 661 (7th Cir. Ill.1998). In these situations the recipient retains substantial control over the context in which the harassment occurs. *Davis Supra* at 656.

Each Plaintiff's event occurred in school during regular class hours. Only occurred after class hours, however, the school and its restrooms remained under the control of the School District.

4) Defendant Allentown School District had "actual knowledge"

Actual knowledge may be satisfied by "a knowledge of substantial risk of serious harm in the context where multiple allegations of sexual abuse are lodged...so that his proclivities for such abuse are well known." Education Amendments of 1972, §901 et seq.; 20 U.S.C.A. §1681 et seq. The U.S. District Court for the Western District of Pennsylvania laid out a very descriptive standard:

Actual knowledge requires more than awareness of the mere possibility of harassment but less than absolute certainty that harassment occurred. An educational institution has actual knowledge when a school district knows the underlying facts, indicating sufficiently substantial danger to students, and was therefore aware of the danger. There is actual knowledge when a school district knows that there is a substantial risk that sexual abuse will occur. *Dawn L. v. Great Johnstown School District*, 586 F. Supp. 2d 332, 367 (2008).

There must be a preponderance of the evidence showing that the school district had actual knowledge of the abuse. *Williams ex rel. Hart v. Paint Valley Local School District*, 400 F.3d 360, 196 Ed. Law Rep. 27, 2005 FED App. 0118P (6th Cir. 2005).



Actual knowledge also requires that the person who has knowledge of the danger must be in position to take action in response. The Supreme Court has held that a damages remedy will not be awarded unless a school official who has authority to address the alleged discrimination and to use effective measures in response to an allegation has actual knowledge of the alleged harassment. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277, 125 Ed. Law Rep. 1055, 158 A.L.R. Fed. 751(1998). A principal's knowledge of harassment could be charged to the school system. *Murrell v. School District No. 1, Denver, Colo.*, 186 F.3d 1238, 137 Ed. Law Rep. 678 (11th Cir. 2003). Both Principal Haddon and Assistant Principal Carter would qualify under this standard because they shared discipline duties at Central Elementary. (Appx. Ex. 11, D.T. Haddon p. 38). They both had the authority to address allegations and use effective measures to respond to incidents as required under the *Gebser* standard. The knowledge of Principal Haddon and Assistant Principal Carter are imputed to Allentown School District.

A teacher, guidance counselor, or school psychologist may also qualify as a school official who can address the alleged discrimination under *Gebser*. According to the federal guidelines that were in place during the 2003-2004 school year, if a responsible school district employee knows, or in the exercise of due cause should have known, of harassment, the school district has "notice." *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, United States Department of Education (2001). (Appx. Ex. 51, P-62, p. 13). The issue then becomes how the Office of Civil Rights defines "responsible employee." Any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student can reasonably believe has this authority or responsibility is considered a "reasonable employee." *Id.* (Appx. Ex. 51, P-62, p. 13).

Under the Department of Education's guidelines, guidance counselor Kimberley Ceccatti, teacher Kristen Csanadi, teacher Miriam LaSanta, teacher John Sechler, and all qualify as employees whose knowledge can be attributed to the District for Title IX purposes. Defense Liability expert, Dr. Kathleen Conn, agrees that a guidance counselor may be an appropriate school official. She noted in her own book that when a principal delegates her authority to the guidance counselor that the guidance counselor may have become a "Gebser-required" school official. (Appx.Ex. 52, D.T. Conn p. 120-121). Principal Eva Haddon stated that she often referred incidents of harassment to Kim Ceccatti. (Appx. Ex. 11, D.T. Haddon p. 38). Under these circumstances, guidance counselor Kim Ceccatti was an appropriate person for the actual knowledge standard to be imputed to the school district. Dr. Conn also states on page 65 of her book that courts seem to agree that a teacher being informed of student-on-student

harassment even without notification to the principal is sufficient to put the district on notice of the problem. (Appx. Ex. 52, D.T. Conn p. 127-128). While Defendant's motion asserts that teachers and guidance counselors are not appropriate officials to give actual knowledge to the District, Defendant's own liability expert disagrees.

The District's Sexual Harassment Policy also stated that a teacher was an appropriate person to whom a student could report a sexual harassment complaint. (Appx. Ex. 1, P-3, p. 2). Information known to any employee who is designated by the School District to respond to harassment complaints is imputed to the district. *Massey v. Akron City Bd. of Educ.*, 82 F. Supp. 2d 735, 141 Ed. Law Rep. 1104 (N.D. Ohio 2000); *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 64 (2d Cir. 1998); *Williamson v. City of Houston, Tex.*, 148 F.3d 462, 466 (5<sup>th</sup> Cir. 1998); *Bonenberger v. Plymouth Tp.*, 132 F.3d 20, 27 (3d Cir. 1997). Ultimately it is immaterial because with every **bathroom incident** at Central Elementary in the 2003-04 school year, either Principal Haddon or Assistant Principal Carter (and sometimes both) were informed of the incident.







Defendants cite *Bostic v. Smyrna School District* multiple times for their proposition that actual knowledge has not been satisfied, but neglect the underlying facts. In *Bostic*, the court decided there were enough material issues of fact with regard to whether the relevant officials had actual knowledge of the abuse and whether the response was deliberately indifferent to allow



In *Williams ex rel. Hart v. Paint Valley Local School Dist.*, the court found:

A school district is deliberately indifferent to a student's sexual abuse by failing to take remedial action to prevent a teacher's molestation of a student if a preponderance of the evidence shows:

- The existence of a clear and persistent pattern of sexual abuse or a substantial risk of sexual abuse by a school employee; and
- The school district had notice of the pattern or substantial risk of sexual abuse; and
- The school district was deliberately indifferent to known facts which presented an unreasonable risk to the safety of a student; and
- The deliberate indifference by the school district was a direct causal link in the deprivation of the student's constitutional right to physical and emotional integrity. *Williams ex rel. Hart* at 363.

The issue then becomes what constitutes a reasonable response and what is clearly unreasonable. A reasonable response implies a duty on the part of the funding recipient, upon notice of possible sexual harassment to investigate and if necessary take remedial action. *Dawn L.*, 369. The response must be reasonable to each allegation. When harassment occurs with relatively high frequency and ineffective responses are rendered on numerous occasions, eventual effective action does not absolve a school district of liability under Title IX. *M.W. v. Panama Buena Vista Union School District*, 110 Cal. App. 4th 508, 1 Cal. Rptr. 3d 673, 178 Ed. Law Rep. 404 (5th Dist. 2003).

i. The District ignored District Policies—

It is per se clearly unreasonable for the District not to follow their policies regarding sexual harassment or the reporting of criminal acts to the police. The Sexual Harassment Policy gave explicit instructions to conduct a formal investigation of sexual harassment that included interviewing all the parties involved and to submit a written report of the results to the Superintendent. (Appx. Ex. 1, P-3, p. 2-3). The Code of Conduct stated that a perpetrator of a level IV infraction will be immediately removed from the school pending such investigation for the safety of the school. (Appx. Ex. 2, P-7, p. 14-15). Level III infractions may result in an

overnight or out of school suspension in addition to other penalties. (Appx. Ex. 2, P-7, p. 14-15). The Code of Conduct and the Memorandum of Understanding give explicit directives to call the police to investigate any possible crimes. (Appx. Ex. 3, P-45). None of these policies were followed.

These policies exist to provide uniformity within the Allentown School District so that students' safety and rights are protected no matter which individual is in charge. For the safety of the students, every District employee is supposed to know how to respond to a sexual harassment and/or criminal allegations. If an individual does not know what to do, the policies provide a reference to guide them. The School Board implemented these policies so that when an incident of sexual harassment or criminal act arises, the District employees would not have to be confused and navigate through an uncharted territory to determine on their own what a reasonable response and discipline would be under the circumstances. Rather, the policies provide an easy road-map to follow. The policies dictate what a reasonable response is supposed to be. These policies provide clear standards of how the Defendants were *supposed* to respond. Those standards were ignored, which is per se clearly unreasonable.

ii. Violations of Criminal Law were not Reported to the Police

Administrators at Central were required to report all crimes to the Allentown Police Department pursuant to the Code of Conduct and the Memorandum of Understanding. Title 24 § 13-1303A(c) imposes a legal duty on each chief school administrator to enter into a memorandum of understanding with the police department having jurisdiction over the school entity. Article 13-A relates to legal requirements for safe schools. The Memorandum of Understanding establishes the District's responsibility to report all student actions which are in

violation of the criminal law. (Appx. Ex. 3, P-45). "Indecent assault," "harassment," "simple assault," and "criminal attempt" are all crimes under Pennsylvania law. (Appx. Ex. 57, P-53; Appx. Ex. 58, P-54; Appx. Ex. 59; Appx. Ex. 60,). Ambiguity whether a certain incident is tantamount to a crime does not excuse non-reporting; prudence dictates the school would err on the side of caution. Defense liability expert, Dr. Kathleen Conn, agrees that it would be best to allow the police to determine whether or not a crime had been committed. (Appx. Ex. 52, D.T. Conn p. 402).

Except for none of the victims were ever interviewed by a detective. Failure to report a criminal offense, in violation of the District's own policy and the Memorandum of Understanding, which is required by safe school laws, is per se clearly unreasonable and amounts to deliberate indifference.

iii. The District did not have a Title IX Coordinator to Investigate Allegations—

A reasonable response needs to be coordinated by a Title IX coordinator. Under federal regulations, each school district shall designate at least one employee to coordinate the district's compliance with Title IX and to conduct prompt investigations of all complaints and administer

appropriate disciplinary action and equitable resolution. Dr. Russell Mayo testified that Evelyn Rossi was the Title IX Coordinator in 2003-04. (Appx. Ex. 50, D.T. Mayo: 18). However, Evelyn Rossi testified that she was not and that she had no responsibility for Title IX investigations. (Appx. Ex. 53, D.T. Rossi p. 14). Principal Haddon testified that she did not know who the Title IX coordinator was. (Appx. Ex. 11, D.T. Haddon p. 109). She testified that she often delegated harassment complaints to Guidance Counselor Kim Ceccatti. (Appx. Ex. 11, D.T. Haddon p. 38). Assistant Principal Carter did not even know what Title IX was. (Appx. Ex. 12, D.T. Carter p. 37). This confusion by the individuals who were supposed to be responsible for the investigation of complaints foreshadows the clearly unreasonable responses to the numerous allegations of sexual harassment. The district failed to have a Title IX Coordinator investigate the incidents, which is required by law. This action is per se unreasonable.

iv. Incidents of Sexual Harassment were not Reported to the District's Central Office Pursuant to School District Policy—

The District had a Sexual Harassment Policy in place, which was published in the District's Official Code of Conduct. (Appx. Ex. 2, P-7, p. 21). Either out of ignorance of their own policies or as a result of incompetent leadership and/or lack of training, the District's policies and procedures were ignored. The Allentown School District's Code of Conduct and Sexual Harassment Policy rightly establish sexual harassment as a violation of Title IX. (Appx. Ex. 1, P-3; Appx. Ex. 2, P-7, Bates 1242). The Sexual Harassment Policy requires all complaints of sexual harassment to be reported to the assistant superintendent of human resources and operations. (Appx. Ex. 2, P-7, Bates 1243). Dr. Karen Boardman testified that principals were required to report sexual harassment complaints to either herself or Ralph Daubert. (Appx. Ex. 54, D.T. Boardman p. 138). But the administrators at Central did not follow through with these

reporting policies.

v. No Adequate Investigation into Complaints of Sexual Harassment—

There was little or no investigation into the sexual harassment allegations at Central Elementary.

This action would be only a start, but there is no evidence that an investigation was done. What exists is only a suggestion on what to do without any action from those responsible

Principal Haddon and Assistant Principal Carter told Miriam LaSanta that they would take care of the situation. (LaSanta Statement: 4, Appx. 43). However, there is no record of any follow-up investigation, and again Haddon and Carter claim to be ignorant of this incident. Furthermore, liability experts for both Plaintiffs and Defendants agree that LaSanta asking to tell her what happened in front of the alleged perpetrator and other students would not be considered an interview. (Appx. Ex. 52, D.T. Conn p. 244; Appx. Ex. 55, D.T. Strauss p. 41).

mistakenly identified, but when that was determined to be incorrect, the investigation was abruptly halted. The claim that Assistant Principal Carter sat with in the cafeteria at the end of the day to identify is clearly unreasonable considering older students would not have been waiting in the cafeteria for their parents to pick them up as was the case with the first grade students.

the two incidents that happened during school hours, the principal should have spoken to all teachers to try and figure out which students were out of class at the time of the incident.

The failure to implement these common-sense investigation procedures is clearly unreasonable and amounts to deliberate indifference.

Defendants still failed in their investigation procedure.

Furthermore, a school needs to maintain records of all reports and investigations of harassment that specifies the type of incident and the remedy so that shortcomings in the remedial actions can be identified. *Id.* at 38-39. These records would also be necessary to assist in future investigations as they would reflect a modus operandi that would have alerted officials in the District administrative office that these were not isolated incidents. The District's failure to implement this policy caused a failure to recognize that all prior incidents fit the definition of

sexual harassment and warranted to be treated as such. (Appx. Ex. 56, Expert Report, p. 53-54).

There are no records because the District's administrative office was not even informed about these allegations. Dr. Karen Boardman testified that she did a search and there were no reports of sexual harassment from Central other than the incident with (Appx. Ex. 54, D.T. Boardman p. 140). The District required sexual harassment incidents to be reported to the administrative office and the school's decision not to follow through with this most basic reporting procedure to assist in the investigation is clearly unreasonable.

vi. The District's Disciplinary Responses were Clearly Unreasonable—

Defendant's disciplinary responses for these allegations were just as unreasonable as their lack of investigation and reporting. The Code of Conduct classifies levels of student misconduct with levels I through IV with level IV being the most severe. (Appx. Ex. 2, P-7, Bates 1233-1236). "Harassment" is considered a level III infraction and "sexual harassment, sexual assault, threatening a person, and intimidation" are level IV infractions. (Appx. Ex. 2, P-7, Bates 1235-1236). The response for Level III violations include a disciplinary referral form to be submitted to administration and become part of the student's permanent record, for parents to be notified in writing, and for all crimes to be reported to the police. (Appx. Ex. 2, P-7, Bates 1235). Discipline for Level IV violations include all Level III consequences and for the offending student to be removed from his school assignment immediately. (Appx. Ex. 2, P-7, Bates 1236). But when [redacted] was identified: [redacted], these disciplinary procedures were not followed.

[redacted] was put on a bathroom restriction for [redacted] (Appx. Ex. 17, D.T. Friebolin p. 97, 98, 99-100; Appx. Ex. 18, D.T. R.F. p. 158-159; Appx. Ex. 11, D.T. Haddon p. 122-123). He was again put on a bathroom restriction after [redacted]

Once again, there is no evidence that the police were called prior to the incident. The lack of any reasonable disciplinary response meets the standard that defines deliberate indifference as "an official decision by the recipient [of federal funds] not to remedy the violations." *Gebser*, 524 U.S. at 290. The lack of appropriate disciplinary responses is per se clearly unreasonable and rises to deliberate indifference.

vii. It was Clearly Unreasonable not to Reform Bathroom Procedures

The District should have also reformed all bathroom procedures by mandating a buddy-system to prevent future incidents. (Appx. Ex. 56, Expert Report, p. 42). While the record shows that changes in school bathroom policy were made after , there is no explanation as to why those changes would not have been made after the first incident.

it is completely unreasonable not to have school-wide bathroom policies that would protect other students from harm. The lack of investigatory and disciplinary response is bad enough, but the lack of safety procedures to prevent future incidents is wholly inexcusable and clearly unreasonable.

*Brooks* is Not a Helpful Case to Follow—

Defendants' use of *Brooks v. City of Philadelphia* in the argument that their response was not clearly unreasonable is mistaken. There are four important differences that make *Brooks* inapplicable in this case. 1.) *Brooks* involved two boys who were kindergarten classmates, whereas

2.) *Brooks* involved only one incident at issue, whereas in this case there are multiple incidents:

*Brooks* noted it was an isolated incident and that there were no similar incidents before or after involving the perpetrator or any other student. *Brooks v. City of Philadelphia* (717 F. Supp. 2d 477, 480 (E.D. Pa. 2010)). At present, there is not an isolated incident but a series of incidents. 3.) In *Brooks*, the response after the first incident was to separate the students. The

response after the second incident was that the police were called and the victim child was transferred. In this case, there were multiple incidents before the police were called to investigate and the only reason that the police were contacted was because father made the call. Defendants implemented a bathroom restriction after the first incident and again after the incidents with no disciplinary actions.

4.) Also, it should be noted that in *Brooks* there was no reference to a Sexual Harassment Policy, a Code of Conduct that mandated police reporting, or a Memorandum of Understanding with a local police department regarding crime reporting. The facts in *Brooks* are completely different from this case.

viii. Plaintiffs' Liability Experts Did Not Find the School District's Response to be Reasonable—

Defendant misrepresents the conclusions of Dr. Dragan and Dr. Strauss and then claim that they are actually using an inappropriate negligence standard. Dr. Dragan testified that while an individual response in a vacuum separated from all the other surrounding circumstances may be reasonable, his review was of the totality of the situation that led him to the conclusion that the school failed to implement their procedures and supervise appropriately and it created a

situation that allowed

Indeed, any response cherry-picked from the underlying facts could appear to be reasonable if it is divorced from all the other surrounding circumstances. Dr. Strauss testified that it is unreasonable to place a bathroom restriction and not implement it. (Strauss: 119, Appx. Ex. 55, D.T. Strauss p. 119). The fact that two separate bathroom restrictions were implemented and shows that these were “bathroom restrictions-in-name-only” and were clearly unreasonable in response to the allegations.

Defendants’ reactions were clearly unreasonable in the response to investigating allegations, reporting allegations to appropriate authorities, , and developing procedures to prevent additional incidents. In many instances, Defendants turned a “blind eye” to obvious dangers of continued sexual abuse and criminal conduct. School districts are under a duty not to act unreasonably in response to known harassment. *Gabrielle M. v. Park Forest-Chicago Heights, IL. School Dist.*, 163, 315 F. 3d 817, 824 (7th Cir. 2003). Defendants violated that duty by ignoring their own procedures for handling criminal allegations and sexual assault allegations. For these reasons, the element of “deliberate indifference” for a Title IX claim has been established. Defendants’ claim of a reasonable response is unfounded.

6) Severe, Pervasive, and Objectively Offensive Harassment that Deprives Victims an Educational Program or Benefit

Under Title IX, Plaintiff must establish that the sexual harassment is so severe, pervasive, and objectively offensive, that it can be said to have deprived the victim’s access to the school’s educational opportunities or benefits. *Davis* at 650. Defendants boldly assert that Plaintiffs suffered no damage:

Deprivation of Educational Benefits

Deprivation of Educational Benefits



Deprivation of Educational Benefits

Deprivation of Educational Benefits



Deprivation of Educational Benefits

Defendants repeatedly and incorrectly assert that a single violation, no matter how severe, could not result in the type of conduct actionable under Title IX. "A single incident" is an inaccurate characterization of Plaintiffs' claims,

That aside, Defendants' assertion still ignores the operative statement in the *Davis* that a single instance of sufficiently severe one-on-one peer

harassment could meet the standard of severe, pervasive, and objectively offensive conduct to constitute sexual harassment under Title IX. *Davis* at 653. Furthermore, both Plaintiff and Defendant liability experts agree that a sufficiently severe single action would arise to Title IX liability. Dr. Conn stated that a severe single incident, such as rape would constitute sexual harassment. (Appx. Ex. 52, D.T. Conn p. 146). Dr. Strauss testified that it makes no difference whether something happens once or multiple times, if it is sufficiently severe it is harassment. (Appx. Ex. 55, D.T. Strauss p. 32).

C. Plaintiffs have Established a Claim Under 42 U.S.C. §1983 Because the Harm Ultimately Caused was Foreseeable, the Allentown School District Acted in Willful Disregard for the Safety of the Minor Plaintiffs, a Supervisory Custodial Relationship Existed Between the Students and the School District and the Actors used their Authority to Create an Opportunity that Otherwise would not have Existed for ]  
to Occur

To bring a claim for a violation of Constitutional Rights through 42 U.S.C. §1983 for a third party's actions, the Third Circuit laid out a four-part test in *Kneipp by Cusack v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. Pa. 1996):

- (1) the harm ultimately caused was foreseeable and fairly direct;
- (2) the state actor acted in willful disregard for the safety of the plaintiff;
- (3) there existed some relationship between the state and the plaintiff;
- (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

1) Foreseeable and Direct Harm

The first part of the test is met in this case because the harm caused by a sexual deviant is foreseeable and direct.

2) The Allentown School District Acted in Willful Disregard for the Safety of the Plaintiffs

Under the “state-created danger” theory of 42 U.S.C. § 1983, Plaintiffs need to show affirmative acts on the part of the school district that increased the danger to the plaintiffs in order for there to be liability. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 201 (1989). This is applicable to both the second part of the test (that the defendant acted in willful disregard for the safety of the Plaintiffs) and fourth part of the test (that the defendant state actor used their authority to create an opportunity that would not have otherwise existed). The Third Circuit has noted that the line between action and inaction is not always clear. “If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be hard to say that its role was not merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.” *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1374 (3d Cir. 1992). From this reasoning, Defendants are liable for their actions and inactions.

Under part two of the state-created danger test, the Third Circuit has also held that to show a willful disregard for the safety of the Plaintiffs, the affirmative acts must shock the conscience. *Brown v. School District*, 2011 U.S. App. LEXIS 19349 (3d Cir. Pa. Sept. 20, 2011). The Third Circuit has noted that the precise degree of wrongfulness depends on the circumstances of the case and how quickly a state actor must respond. For example, in a prison where forethought about an inmate’s welfare is possible, deliberate indifference to a prisoner’s medical needs may be sufficiently shocking, while a higher fault standard is proper for a “hyperpressurized” situation like a police chase, and in cases that fall in between those two extremes where there is neither the need for a split-second decision nor the luxury in proceeding in a deliberate fashion, that standard would be a level of gross negligence or arbitrariness that

shocks the conscience. *Estate of Smith v. Marasco*, 318 F. 3d 497, 508-509 (3d Cir. Pa. 2003).

In this case, the lower threshold of deliberate indifference is applicable because the District did have time to deliberate and develop plans for handling a situation of alleged sexual assault or sexual harassment as evidenced by the fact that these plans were written in numerous district policies including the Sexual Harassment Policy, the Code of Conduct, and the Memorandum of Understanding. (Appx. Ex. 1, P-3; Appx. Ex. 2, P-7; Appx. Ex. 3, P-45). Those policies require sexual assault allegations to be handled with a thorough and complete investigation rather than an immediate reaction, which makes deliberate indifference the appropriate standard. Defendants attempt to argue that the alleged chaos of an early dismissal because of snow on March 16<sup>th</sup> should raise the standard. However, snow is common in Pennsylvania during winter and it is expected that a school would have early dismissal plans in place for such events. Modern meteorological forecasting would have alerted school officials days in advance that an early dismissal could be necessary. Any contention that a higher "shocks the conscience" standard would be necessary is baseless. Deliberate indifference is the proper standard.

A number of the Defendants' actions not only meet the applicable deliberate indifference standard, but also demonstrate a level of gross negligence or arbitrariness that shocks the conscience. The district took numerous affirmative actions that shock the conscience and increased the danger to one or more plaintiffs. Those actions are listed as follows:

1. The District provided inadequate training to staff on sexual harassment, responding to sexual harassment, and discipline procedures, which left employees ignorant of the district policies and unprepared to remedy or prevent a

constitutional violation. (Appx. Ex. 64, Expert Report, p. 36-39). This act demonstrates deliberate indifference to the constitutional rights of the students.

2.

3.

4.

5.

6.

7.

8. The District, through Assistant Principal Carter, directed teacher Kristen Csanadi not to report \_\_\_\_\_ to the police. (Appx. Ex. 20, Csanadi Statement 3/13706: 9-10). This is a violation of the District's policy to report crimes to the police. This affirmative act effectively prevented the reporting and investigation of a crime placing future victims in greater danger.

9. The District, through Assistant Principal Carter, delegated the investigation of [redacted] to Guidance Counselor Kim Ceccatti when the underlying facts and school policy called for an administrator to handle investigations of potential sexual harassment. (Appx. Ex. 16, P-27, Bates 1389). This affirmative act ran contrary to District policies and added additional confusion around the District's poor handling of sexual assault allegations.
10. The District, through Principal Haddon, gave false assurance to [redacted] mother that [redacted] was being taken care of. (Appx. Ex. 28, D.T. p. 9-11). This false assurance was an affirmative act that effectively prevented the reporting and investigation [redacted]
11. The District, through teacher John Sechler, sent [redacted] to the guidance counselor [redacted] instead of to the building administration. (Appx. Ex. 32, D.T. p. 29). This violated the District's policies that called for an administrator to handle investigations of potential sexual harassment and prevented the investigation of the incident and discipline to take place inviting future acts of sexual harassment. This affirmative act caused a significant increase in danger to future victims.
12. The District, through Principal Haddon and Assistant Principal Carter, suspended [redacted] for an act of self-defense. (Appx. Ex. 32, D.T. p. 32; Appx. Ex. 34, D.T. p. 34). This was done instead of treating [redacted] as the victim, which invited future acts [redacted]. This affirmative act is both grossly negligent and arbitrary in that it shocks the conscience.

13. The District gave false assurances that the police had already been contacted about the incident concerning her son. (Appx. Ex. 34, D.T. p. 36). This false assurance is an affirmative act that effectively prevented police involvement and placed other students at risk.
14. The District, through Guidance Counselor Kim Ceccatti, wrongfully informed the Office of Children and Youth that  
which is directly contrary to the victim's statements.  
( p. 18-19, Appx. Ex. 27, D.T. p. 18-19; Appx. Ex. 32, D.T. p. 26-30). This act prevented the timely intervention of caseworkers and law enforcement placing other children at risk of future harm.
15. The District, through Principal Haddon, moved the first grade classrooms from the area of the building where there were individual bathrooms for every other classroom to the basement and first floor of the building where there were only public bathrooms. (Appx. Ex. 10, D.T. p. 155). Without the privacy and security of individual classroom bathrooms, first-graders were significantly more vulnerable. This affirmative act placed all first graders at a much greater risk of harm in the bathroom.
16. The District, through Principal Haddon, placed the in-school suspension area in the hallway near the first grade classrooms. (Appx. Ex. 10, D.T. p. 57). This made first grade students more vulnerable  
This is an affirmative act that placed first-graders in a greater risk of danger.

17. The District, through Principal Haddon, hired Jerald Brown, a man who was not a trained teacher or child care provider, to monitor the in-school suspension area.

(Appx. Ex. 11, D.T. Haddon p. 85). An untrained staff member in charge of supervision of problematic students placed all students in greater risk of danger.

18. The District, through Principal Haddon and Jerald Brown, arranged the desks in the in-school suspension area where at least one desk was around the corner from where the monitor could see. (Appx. Ex. 10, D.T. p. 142; Appx. Ex. 65, D.T. Brantley p. 18). The result was that any student sitting there would be unsupervised. This affirmative act is grossly negligent and places all students at greater risk of danger.

19. Despite knowing that the district, through Assistant Principal Carter, assigned to the in-school suspension area where he would be closer in proximity to first-grade children. (Appx. Ex. 35, P-6). This affirmative act placed all first-graders in the basement to be at a greater risk of danger. It is particularly shocking that Jerald Brown was not informed of bathroom restriction.

20. Despite the District, through Jerald Brown, assigned to sit at the desk closest to the bathroom where he would most easily be able to sneak away. (Appx. Ex. 65, D.T. Brantley p. 18). This act is grossly negligent in how easy Defendants made it :

Defendants' affirmative acts meet the deliberate indifference standard to shock the conscience for numerous reasons. First, any act that inhibits police investigation

, not only borders on obstruction of justice, but also

By delaying the ultimate intervention of law enforcement, the victim's right to swift justice is hampered, and other members of the public are endangered by being exposed

Actions like giving false assurances that the police were involved or directing a staff member not to contact the police were not instances of mere inaction. Rather, these arbitrary and grossly negligent affirmative acts by the district dissuaded and impeded people like teacher Miriam LaSanta, teacher Kristen Csanadi, mother, mother, and from contacting the police. These acts are similar to the grossly negligent affirmative acts of intervention found by the Third Circuit when the police sent an intoxicated woman to walk home alone after they separated her from her husband and allowed him to leave. *Kneipp* at 1201-1203. The same principle applies with this case. When the government intervenes with someone who needs emergency help and gives assurances to others that they would take care of the situation, they have made an affirmative act under §1983. The District undertook these grossly negligent affirmative acts that shock the conscience, which makes dismissing the §1983 action inappropriate.

The District also took affirmative actions directly contrary to the Sexual Harassment Policy, the Code of Conduct, and the Memorandum of Understanding. The policies and procedures exist to protect the constitutional rights of the Plaintiffs. Violating those policies, like reporting sexual harassment to the wrong person and deciding not to call the police, show deliberate indifference because the entity is ignoring the rules it has established to protect the constitutional rights of the students. This is an astonishing double-standard if parents and students are expected to abide by District policies that faculty and administrators ignore.

The absurdity is compounded by the fact that these policies were supposedly reviewed

every year. This leads to the inevitable conclusion that there was little or no training in these policies. (Appx. Ex. 64, Expert Report, p. 36-39). Courts in the Third Circuit have recognized inadequate training may be part of §1983 claim against a school district when there is a causal nexus between the failure to train and the harm caused and it shows that the school district was deliberately indifferent to the plaintiff's constitutional rights. *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474, 494-95 (W.D. Pa. 2010) See also, *E.N. v. Susquehanna Township School District*, 2011 U.S. Dist. LEXIS 91316 \*18(M.D. Pa.2011). The absence of that specific training can reasonably reflect a deliberate indifference to constitutional violations. *Taylor* 495. The Third Circuit has recognized that inadequate training can be part of a §1983 violation. If the need for more or different training is so obvious, and the inadequacy is likely to result in the violation of constitutional rights, then the policymakers can reasonably be said to have been deliberately indifferent to the need. *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 725(3d Cir. Pa. 1989)(citing *City of Canton v. Harris*, 109 S. Ct. 1197 (U.S. 1989)).

In this case, the Allentown principals did not receive yearly training on sexual harassment policies besides a highlighting of whatever changes were being made to the school's code of conduct. (Appx. Ex. 66, D.T. Daubert p. 92). does not recall any sexual harassment discussion prior to the '03-'04 school year. (Appx. Ex. 10, D.T. p. 229). Failure to adequately train was a direct cause of unreasonable responses that contradicted the District's own policies and denied Plaintiffs their constitutional protections. The repeated affirmative actions taken by the District that are contrary to the District's policies not only shock the conscience with their deliberate indifference, but also baffle the mind.

The District took affirmative acts in regards to the school's in-school suspension program that are grossly negligent and defy common-sense. Actions that include: removing the first grade

from classrooms with private bathrooms, placing the in-school suspension area in the hallway by the re-located first grade, arranging desks so that they could not all be seen by the monitor at the same time, and assigning to that isolated desk all fall under this category. These acts are similar to the state created danger found in *Maxwell*, when the court found that locking the classroom door and isolating the victims with their attackers met the standard for a section 1983 suit. *Maxwell v. School Dist. of Philadelphia*, 53 F. Supp. 2d 787, 793 (E.D. Pa. 1999). Here, the affirmative acts of the Defendants likewise isolated Even the Defendants admit on page 41 of their brief that the State Created Danger theory could apply to these actions surrounding But the "perfect storm," as Defendants describe it, was the direct result of numerous actions taken by the District. Defendants cannot seriously claim that the circumstances of the school forced their hand with these policies. The in-school suspension room was relocated after and later eliminated in favor of after-school detention in the library. (Appx. Ex. 10, D.T. p. 58. 90). These common-sense options were available before

The reckless decisions of Central Elementary administration created a danger that would not have otherwise existed. This demonstrates a deliberate indifference to the safety and constitutional rights of their first grade students.

Central Elementary conducted numerous affirmative acts that significantly increased the danger to their students. A reasonable jury would likely find that these actions shock the conscience because of the effect of hindering a necessary police investigation and for the incompetence and naivety of Allentown School District employees.

### 3) A Custodial and Supervisory Relationship between the Allentown School District and the Plaintiffs

The third part of the test appears to be uncontested. Each Plaintiff was a student enrolled at Central Elementary School during the 2003-04 school year. Central Elementary is part of the

Allentown School District—a public school district in the Commonwealth of Pennsylvania. As students enrolled in the district, each Plaintiff had a relationship with the Defendant, state-actor. The third element is met.

4) The Allentown School District's Actions Created an Opportunity that Otherwise would not have Existed for to Occur.

The fourth issue is met because Defendants created opportunities that would not have otherwise been there. As explained above in section (2) “Acted in Willful Disregard for the Safety of the Plaintiff,” Defendants created a danger by doing the following:

- 
- 
- giving false assurance to sexual harassment victims and their parents that the situation would be handled properly;
- directing teachers not to call the police in violation of the District’s policies;
- placing an in-school suspensions area in a hallway with first grade classrooms;
- assigning to the in-school suspension area without communicating to the monitor that had bathroom restrictions; and
- assigning to a seat near the bathroom that was out of the view of the faculty monitor.

The Defendants’ actions created the circumstances for to occur. The final element is met and each Plaintiff has a viable 1983 claim under the “state-created danger” theory.

Defendants' Mistakenly Rely on *D.R.v. Middle Bucks Area* as being  
Analogous to the Case at Bar

Defendants' reliance on *D.R.v. Middle Bucks Area Vocational Technical School* is misplaced. The only thing that case has in common with the case at bar is that it involved

In *D.R.*, the teacher was never

informed of the incidents and the plaintiffs had to rely on the assertion that the teacher should have known. *D.R.* at 1366. In this case, multiple teachers were immediately informed of a bathroom incident, each incident was reported to Principal Haddon or Assistant Principal Carter (sometimes both), and by the time of had already been identified three times. In *D.R.*, it was very difficult to show a state-created danger when the state was unaware of the but in this case the school was aware of very specific allegations and still acted with deliberate indifference.

Another important difference is that in *D.R.* the claim was that the darkroom for photography and the unisex bathroom created the danger. Indeed, the Third Circuit was correct that an architectural feature is not a state action. In this case, the danger with regards to is not the architectural layout of the basement of Central Elementary School. The dangers are the specific actions of the District that lead to the "perfect storm." Principal Haddon moved the first grade classes from rooms where they would have their own private bathroom. Principal Haddon created an in-school suspension area for problematic kids in the basement hallway near the first grade classrooms. The desks in the in-school suspension area were arranged in a manner where all students could not be properly monitored. was assigned to the in-school suspension area without anyone informing the monitor of his bathroom restrictions. These specific actions of the District created the "perfect storm" that led to , not the layout of the building.

Individual Defendants are Not Entitled to Summary Judgment on the Basis of  
Qualified Immunity—

To maintain a §1983 claim against individual defendants, Plaintiffs must “demonstrate a violation of a right protected by the Constitution or laws of the United States that was committed by a person acting under the color of state law.” *Nicini v. Mora*, 212 F. 3d 798, 806 (3d Cir. 2000). Plaintiffs must show that a reasonable person would have known that these actions violated clearly established statutory and constitutional rights of the Plaintiffs. *Walter v. Pike County, Pa.*, 544 F.3d 182 (3d Cir. 2008). Defendants concede in their brief they acted under color of state law. The only issue that remains is whether their actions violated the Constitution or federal laws. As outlined previously throughout this brief, they did.

First, it is simply untrue that no one identified \_\_\_\_\_ for any incidents  
prior to February 5, 2004.

This background should have alerted Haddon, Carter, and Ceccatti that Plaintiffs’ allegations were not just isolated incidents of horseplay, but reflected interconnected violations of federal statutory and constitutional rights.

Each named Defendant violated the rights of at least one of the Plaintiffs. This is emphasized as follows:

Kim Ceccatti wrongfully reported to the Office of Children and Youth that  
, when both Plaintiffs reported that there was  
(Appx. Ex. 27, D.T. p. 18-19; Appx. Ex. 32, D.T. p. 28-30).

Assistant Principal Bradley Carter told Miriam LaSanta that the incident with would be handled. Carter told that the incident involving her son would be handled and the perpetrator would be out of school. Carter directed Kristen Csanadi not to report to the police. Carter delegated the investigation of incident to Ceccatti when the policies required an administrator to act. (Appx. Ex. 1, P-3; Appx. Ex. 2, P-7). Either Carter or Haddon suspended for defending himself against instead of treating him as the victim and properly disciplining Assistant Principal Carter assigned to the in-school suspension area without informing the monitor of bathroom restrictions.

Principal Eva Haddon assured Miriam LaSanta that the situation involving would be handled. Either Haddon or Carter suspended for defending himself against instead of treating him as the victim and properly disciplining. Principal Haddon placed the in-school suspension area for problematic students near the first grade classrooms. Principal Haddon hired a man who was not a certified teacher to monitor the suspension area. Principal Haddon was responsible for the arrangement of desks that made it impossible for the monitor to watch all students. Those actions led to a violation of Plaintiffs' rights.

It is curious that Defendants cite *Irene B. v. Philadelphia Acad. Charter Sch.*, 2003 U.S. Dist. LEXIS 3020 (E.D. Pa. Jan. 29, 2003) because in that case the court refused to dismiss the

claim against the defendant principal in his official capacity based on qualified immunity. That case affirmed that if plaintiffs showed that the defendant acted unreasonably he would be compelled to defend his §1983 actions personally. It has been demonstrated that enough facts are available that support the contention that Haddon, Carter, and Ceccatti acted unreasonably and were liable for the violations of Plaintiff's rights. Given the background knowledge that was already available, a reasonable person would have known that these actions violated clearly established statutory and constitutional rights of the Plaintiffs. Eva Haddon, Bradley Carter, and Kimberly Ceccatti should not be dismissed from the §1983 claim against them.

#### IV. CONCLUSION

All the elements of a claim under Title IX have been met. Defendant had actual knowledge of each ; showed deliberate indifference because of their unreasonable response to a known danger; and

The element of "actual knowledge" is met because Defendants were aware of a substantial risk that ; would occur. Prior to each incident, an "appropriate person" was informed of very specific allegations. The principal or assistant principal (sometimes both) was informed of each incident. Each incident was specific enough that Defendants would have been aware that ; was occurring and in a number of incidents Defendants were definitely aware 1

Defendants were deliberately indifferent to the known acts ( Besides the incident, little or nothing was done in response to each allegation. For allegations where

was unidentified, there was no reasonable investigation to try to identify the perpetrator, nor were there any policy changes to prevent future acts. Central Elementary did not even bother to change the school's bathroom procedures to prevent: until after. For allegations where was identified, there was virtually no discipline and virtually no corrective measures that were completed to prevent the from re-occurring. Neither the District office, nor the police were called about any bathroom incidents (until), which was a clear violation of District policy and the Memorandum of Understanding which is statutorily required. This lack of response to a known danger was clearly unreasonable, which satisfies the element of "deliberate indifference."

Defendants violated §1983 by conducting numerous affirmative acts that gave the opportunity that otherwise would not have existed. The resulting harm was reasonably foreseeable. Defendants' acts impeded police involvement, violated the District's policies, and placed all first-grade students in significantly greater danger. These acts shock the conscience because of their deliberate indifference to Plaintiffs' rights. Plaintiffs' §1983 claim is valid and should not be dismissed.

For the reasons previously outlines, both the §1983 claim and the Title IX claim have

merit. Neither should be dismissed.

Respectfully submitted,

**PFEIFFER, BRUNO, MINOTTI & DeESCH**

BY: /S/ JAMES L. PFEIFFER  
JAMES L. PFEIFFER, ESQ., I.D. # 47268  
44 North 2<sup>nd</sup> Street  
P.O. Box 468  
Easton, PA 18042  
(610) 258-4003, FAX: (610) 258-1943  
jpfeiffer@pbmdlaw.com  
Attorney for Plaintiffs

/S/ CHARLES BRUNO  
CHARLES BRUNO, ESQ., I.D. #52812  
44 North 2<sup>nd</sup> Street  
P.O. Box 468  
Easton, PA 18042  
(610) 258-4003, FAX: (610) 258-1943  
cbruno@pbmdlaw.com  
Attorney for Plaintiffs

/S/ BLAKE W. RUSH  
BLAKE W. RUSH, ESQ., I.D. # 94498  
44 North 2<sup>nd</sup> Street  
P.O. Box 468  
Easton, PA 18042  
(610) 258-4003, FAX: (610) 258-1943  
brush@pbmdlaw.com  
Attorney for Plaintiffs

/S/ ANDREW P. GOULD  
ANDREW P. GOULD, ESQ., I.D. # 254766  
44 North 2<sup>nd</sup> Street  
P.O. Box 468  
Easton, PA 18042  
(610) 258-4003, FAX: (610) 258-1943  
agould@pbmdlaw.com  
Attorney for Plaintiffs

DATED: February 2, 2012